U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 April 2005

BALCA Case No.: 2004-INA-93
ETA Case No.: P2002-CA-0929820/VA

In the Matter of:

LITTLE JOE'S RESTAURANT,
Employer

on behalf of

JUAN MAURICIO JORQUERA-CACERES,
Alien.

Appearances: James G. Roche, Esquire
Law Offices of James G. Roche
Santa Ana, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a restaurant for the position of Cook. (AF 22-23).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File.

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On April 2, 2001, Employer, Little Joe's Restaurant, filed an application for alien employment certification on behalf of the Alien, Juan Jorquera-Caceres, to fill the position of Cook. Minimum requirements for the position were listed as two years of experience in the job offered. The job to be performed was described as follows:

> Pare, clean, cook, season, and prepare meats, vegetables, soups and desserts. Responsible for food and quality control. Roast, fry, bake, steam and broil meats, vegetables, fish seafood and other foodstuffs. Utilize kitchen equipment and utensils in addition to measuring and mixing various ingredients according to recipes. Clean kitchen equipment and utensils used.

(AF 22).

Employer received one applicant referral in response to its recruitment efforts. That applicant was rejected for failure to respond to a letter of contact instructing that he complete and return an employment application in order to be considered for the position. (AF 25-27).

A Notice of Findings (NOF) was issued by the CO on September 11, 2003, proposing to deny labor certification based upon a finding that Employer had rejected an apparently qualified U.S. worker for other than lawful, job-related reasons. Noting that the applicant's resume clearly shows he has the experience required for the job, the CO concluded that the extra step of requiring the applicant to submit an application when he had already submitted a resume could have discouraged the applicant from pursing the job. The CO concluded this demonstrated a lack of good faith effort to recruit on the part of Employer and questioned why no further effort was made to contact the applicant. (AF 18-20).

In Rebuttal, Employer cited several Board of Alien Certification Appeals (BALCA) decisions in support of its contention that its contact letter, sent certified mail, to further investigate the applicant's credentials, was sufficient to demonstrate a good faith effort at recruitment. As justification for the application request, Employer asserted the necessity for this signed application as "express consent from the applicant to the employer authorizing him to contact every reference, and ex-employer therein". (AF 7-14).

A Final Determination denying labor certification was issued by the CO on December 2, 2003, based upon a finding that Employer had failed to demonstrate good faith recruitment and had not documented lawful rejection of the U.S. worker. The CO concluded that Employer had not shown the necessity for sending an employment application when the applicant had already submitted his resume. (AF 5-6).

Employer filed a Request for Review by letter dated December 29, 2003, and the matter was referred to this Office and docketed on April 6, 2004. (AF 1-4). Employer filed an Appeal Brief on April 26, 2004.

DISCUSSION

Federal regulations at 20 C.F.R. § 656.21(b)(6) state that the employer is required to document that if U.S. workers have applied for a job opportunity offered to an alien, they may be rejected solely for lawful job related reasons. This regulation applies not only to an employer's formal rejection of an applicant, but also to a rejection which occurs because of actions taken by the employer. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the

employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The Board has held that where an applicant's resume raises a reasonable possibility that he/she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design,* 1989-INA-118 (Nov. 29, 1990 (*en banc*). The employer's responsibility to investigate can be accomplished by interview or other means. Under certain circumstances, such other means may include sending the applicant a written request for clarifying information. However, whatever means are utilized by the employer, they may not place unnecessary burdens on the recruitment process, be dilatory in nature, or otherwise have the effect of discouraging U.S. applicants from pursuing the job opportunity. *Ryan, Inc.,* 1994-INA-606 (Sept. 12, 1995)(holding that employer failed to recruit workers in good faith where it sent follow-up letters to applicants requiring the applicants to submit excessive information).

In the instant case, we conclude that Employer failed to recruit workers in good faith. Requiring that an applicant complete and mail an "Application for Employment" prior to interviewing or even speaking with the applicant, where the applicant had already sent a resume which clearly detailed his experience and qualifications for the job, had a chilling effect, which apparently discouraged this U.S. applicant from continuing to pursue this position. Employer reported that the applicant did not respond to its contact letter so he was "deemed unavailable." However, this applicant had already sent a detailed description of his prior experience in the form of a resume that clearly demonstrated he had more experience than was required for the job. There was no need to follow it up with an employment application prior to being considered for the position.

Employer's contact letter appears to be more an effort to deter rather than recruit prospective applicants. As was noted by Employer, the application would have given Employer the "express consent . . . to contact every reference, and ex-employer therein." (AF 8). Generally, in recruiting a new employee, references are not verified until an

employer has interviewed an applicant and determined that he or she is a serious potential hire. Most job applicants in search of a position would quite reasonably be reluctant to give out references to be contacted until there was some reasonable expectation of potential employment.

Based upon the foregoing, we conclude Employer has not met its burden to show that U.S. workers are not able, willing, qualified or available for this job opportunity, and accordingly, determine that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten

pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.